STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: Texas

REQUIREMENTS FOR ADVANCE DIRECTIVES UNDER STATE PLANS FOR MEDICAL ASSISTANCE

The following is a written description of the law of the State (whether statutory or as recognized by the courts of the State) concerning advance directives. If applicable States should include definitions of living will, durable power of attorney for health care, durable power of attorney, witness requirements, special State limitations on living will declarations, proxy designation, process information and State forms, and identify whether State law allows for a health care provider or agent of the provider to object to the implementation of advance directives on the basis of conscience.

See attached pages 1a through 1e

STATE Texas
DATE REC'D NOV - 7 1991
DATE APP'V'D DEC - 5 1991
DATE EFF DEC - 1 1991
HCFA ID? 91-31

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# STATE OF TEXAS
# GENERAL INFORMATION ON RIGHTS TO MAKE TREATMENT DECISIONS

In Texas, there are only three ways in which an individual's right to make treatment decisions may be transferred to another person:

- The competent individual may make the decision in the form of properly executed directives (verbal or written, such as Directive to Physicians/Living Will or Durable Power of Attorney for Health Care),
- The individual may be declared incompetent by a court of law and have a guardian appointed who can make his/her treatment decisions, or
- The individual is determined by his/her physician to be medically or physically incapable of communication and in a terminal condition.

## I. DIRECTIVE TO PHYSICIANS/LIVING WILL

The Directive to Physicians/Living Will found in the Texas Natural Death Act (Texas Health and Safety code §672.001-021), was originally enacted in 1977 and amended since then - most recently in 1989. The statute does not require an individual to follow precisely the form it contains, but permits the individual to add specific instructions of his/her own choosing - including designation of another person to make treatment decisions on the individual's behalf when the individual becomes comatose, incompetent, or otherwise physically or mentally incapable of communication

Additionally, the individual may want to list particular treatment to be withheld or withdrawn if in a terminal condition - for example, "I do not want antibiotics, surgery, cardiac resuscitation, a respirator, artificial feeding . . ." (See Attorney General Opinion No. JM837 relating to artificial feeding as a life-sustaining procedure.) The individual may emphasize the desire to be kept comfortable and pain-free even though medication may shorten life.

The Directive to Physicians/Living Will must be signed in the presence of two witnesses, who must also sign the Directive to Physicians/Living Will. The witnesses may not be:

(1) related by blood or marriage;
(2) entitled to any portion of the individual's estate on upon death of the individual;
(3) a claimant against the estate at the time of signing;
(4) the individual's physician or any of the physician's employees;
(5) an employee in a health care facility in which the individual is a patient, if the employee is providing direct patient care to the individual or is directly involved in the facility's financial affairs.

The individual should discuss the Directive to Physicians/Living Will with his/her doctor, who should make a copy of it as part of the medical record.

Properly signed and witnessed, a Directive to Physicians/Living Will remains in effect until or unless the individual revokes it. As long as an individual is competent, his/her own expressed wishes (verbal or written) always supersede a Directive to Physicians/Living Will.

If a female is diagnosed as pregnant, and that diagnosis is known to the physician, the directive will have no force or effect during the course of the pregnancy.

## II. DURABLE POWER OF ATTORNEY

Texas has a Durable Power of Attorney (PoA) law that permits an individual to designate another individual as his or her attorney in fact or agent by power of attorney, to be in effect beyond the point of the individual's disability or incompetence. In such a case, the document must specify "this power of attorney shall not terminate on disability of the principal" or similar words showing the intent of durability of the power of attorney beyond the point of disability or incompetence. A PoA must be filed for record in the county in which the principal resides, except for a power of attorney executed for Medical Care. A durable PoA executed for Medical Care must meet the requirements found as Tet. Rev. Civ. Stat. Act 4590h-1.

## III. DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Texas also has a Durable Power of Attorney for Health Care law (Tex. Rev. Stat. Art. 4590h-1) that permits an individual to appoint an agent specifically authorized to make medical treatment decisions on the individual's behalf. These decisions can include the decision to refuse or withdraw consent to medical treatment. The agent can make medical decisions for the individual when the individual lacks the capacity to make decisions himself/herself, regardless of whether or not the individual is in a terminal condition. The agent may not be one of the following persons:

(1) the individual's health care provider;
(2) an employee of the individual's health care provider unless the person is the individual's relative;
(3) the individual's residential care provider; or
(4) an employee of the residential care provider unless the person is the individual's relative.

The Durable Power of Attorney for Health Care can be an extremely useful complement to a Directive to Physicians/Living Will. It can broaden and strengthen control over treatment choices when an individual is unable to exercise the right of informed consent. A disclosure statement must be signed as part of a Durable Power of Attorney for Health Care.

Both parts, the Disclosure Statement and the Durable Power of Attorney for Health Care portions, must be properly executed and witnessed. Witnesses may not be:

(1) the individual's agent;
(2) the individual's health or residential care provider or an employee of the health or residential care provider who is providing direct care;
(3) a spouse or heir;
(4) a person entitled to any part of the estate, you the death of the individual under a will or deed in existence or by operation of law; or
(5) any other person who has any claim against the estate of the individual.

## IV. GENERAL INSTRUCTIONS FOR ADVANCE DIRECTIVES

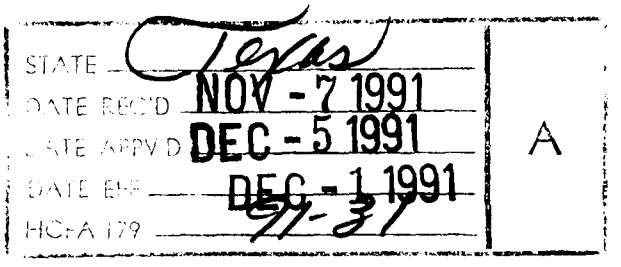
- Keep signed originals with important personal papers at home.
- Give signed copies to doctors, family, agent, or other health care providers.
- If possible, the individual should review the Directive to Physicians/Living Will or Durable Power of Attorney for Health Care from time to time to make sure it continues to properly express the individual's intent.
- If an individual executes both a Directive to Physicians/Living Will and a Durable Power of Attorney for Health Care and names an agent on the Directive to Physicians/Living Will, it is best to execute them both on the same date, and to designate the same person to act. Otherwise, inconsistencies may cause interpretive difficulties, and the document executed on the latest date will control.

## V. WHEN A PERSON IS INCOMPETENT AND HAS NO DIRECTIVE AND HAS NO LEGAL GUARDIAN

(a) If an adult qualified patient has not executed or issued a directive and is comatose, incompetent, or otherwise mentally or physically incapable of communication, the attending physician and the patient's legal guardian may make a treatment decision that may include a decision to withhold or withdraw life-sustaining procedures from the patient. A qualified patient is one who has been determined to be in a terminal condition, in accordance with the Texas Natural Death Act.

(b) If the patient does not have a legal guardian, the attending physician and at least two persons, if available, of the following categories, in the following priority, may make a treatment decision that may include a decision to withhold or withdraw life-sustaining procedures:

(1) the patient's spouse;
(2) a majority of the patient's reasonably available adult children;




TN No. 91-31
Supersedes Approval Date DEC - 5 1991 Effective Date DEC - 1 1991
TN No. [illegible]

(3) the patient's parents; or
(4) the patient's nearest living relative.

(c) A treatment decision made under paragraph (a) or (b) must be based on knowledge of what the patient would desire, if known.

(d) A treatment decision made under paragraph (b) must be made in the presence of at least two witnesses who are not:

(1) related to the patient by blood or marriage;
(2) entitled to any part of the patient's estate after the patient's death under a will or codicil (amendment to a will) executed by the patient, or by operation of law;
(3) the attending physician;
(4) an employee of the attending physician or health care facility in which the patient is receiving services;
(5) a patient in the same health care facility;
(6) a person who, at the time of treatment decision and witnessing, has a claim against any part of the patient's estate after the patient's death.

## VI. CONSCIENTIOUS OBJECTION

The only reference to conscientious objection in Texas law concerning advanced directives is in the Natural Death Act (Health and Safety Code §672.016(c), and this citation addresses conscientious objection only in relation to physicians.